LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 16 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1591

OCTOBER TERM, 1971

STATE OF OHIO,

Petitioner,

v.

HARVEY CLAYTON GRIFFITH,

Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

---

GEORGE C. SMITH
*Prosecuting Attorney*
Franklin County, Ohio
Columbus, Ohio 43215

DAVID H. BODIKER
*Assistant Prosecuting Attorney*
Franklin County, Ohio
Franklin County Court House
Columbus, Ohio 43215

and

LEO J. CONWAY
*Assistant Attorney General*
State of Ohio
40 S. Third Street
Columbus, Ohio 43215

Counsel for Petitioner

## INDEX

Opinions Below . . . . . 1
Jurisdiction . . . . . 1
Questions Presented . . . . . 2
Statutory and Constitutional Provisions Involved . . . . . 2
Statement of the Case . . . . . 3
Reasons for Granting the Writ . . . . . 5
Conclusion . . . . . 8
Affidavit . . . . . 8
Appendix – Decision of Court of Appeals . . . . . .
Appendix – Appeal from the Court of Appeals . . . . . .
Appendix – Motion for leave to appeal from the Court of Appeals . . . . . .

## CITATIONS

*Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198 (1948) . . . . 7
*Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935) . . . 6
*State v. Orth*, 79 Ohio St. 131 (1909) . . . . . 7
*Texas v. White*, 7 Wall 700, 74 U.S. 227 (1869) . . . . . 6
*Wigmore, Evidence*, (3rd Edition, 1940) Sections 2190 and 2191 . . . . . 7

IN THE
SUPREME COURT OF THE UNITED STATES
No.
OCTOBER TERM, 1971

STATE OF OHIO,
Petitioner,
vs.
HARVEY CLAYTON GRIFFITH,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner prays that a Writ of Certorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on the 18th day of November, 1970 dismissing petitioner's appeal as of right and overruling petition for leave to appeal.

## CITATIONS TO OPINIONS BELOW

The opinion of the Tenth District Court of Appeals is unreported and is printed in the Appendix, infra, page_____. No opinion was rendered by the Supreme Court of Ohio. The dismissal of the appeal as of right is reported in XLIII Ohio Bar No. 45, page 1357 and printed in the Appendix, infra, page_____. The overruling of the motion for leave to appeal is reported in XLIII Ohio Bar No. 31, page 1357 and printed in the Appendix, infra, page_____.

## JURISDICTION

The dismissal of Petitioner's appeal as of right and the overruling of Petitioner's motion for leave to appeal were both entered by the Supreme Court of Ohio, the highest state court in which a decision could be had, on November 18, 1970. the jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

## QUESTIONS PRESENTED

In the opinion of the Petitioner, the following questions are presented:

1. Do the people of the State of Ohio, as the plaintiff in a criminal case, and as represented by the prosecuting attorney, fall within the term "any person" as provided for in the Fourteenth Amendment of the United States Constitution and may they therefore be denied due process of law and the equal protection of laws by the actions of the courts and/or the legislatures?

2. Does a statute which prevents a spouse from testifying, because of incompetency, in all cases against the other spouse, deny the people of the State of Ohio the right to call witnesses in the prosecution of a criminal case and does such statute also deny the witness, so excluded, the equal protection of the laws by creating an arbitrary and unreasonable classification of competency?

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

**AMENDMENT XIV:**

> "***; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also Section 2317.01, Revised Code of Ohio:

Competent witnesses.

All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

And Section 2945.42, Revised Code of Ohio:

Competency of witnesses.

No person is disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof as a party or otherwise, or by reason of his conviction of crime. Husband and wife are competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against

each other in all actions, prosecutions, and proceedings for personal injury of either by the other, bigamy, or failure to provide for, neglect of, or cruelty to their children under sixteen years of age. A wife may testify against her husband in a prosecution under section 3113.01 or 3114.03 of the Revised Code for neglect or abandonment of such wife. Such interest, conviction, or relationship may be shown for the purpose of affecting the credibility of such witness. Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or bagamy, or failure to provide for, or neglect or cruelty of either to their children under sixteen years of age, or neglect or abandonment of such wife under such sections. The presence or whereabouts of the husband or wife is not an act under this section. The rule is the same if the marital relation has ceased to exist.

## STATEMENT OF THE CASE

Respondent, Harvey Clayton Griffith, was indicted jointly with one Jimmy L. Ray on May 21, 1969, by the Grand Jury of Franklin County, Ohio, on nineteen separate count arising out of the armedrobbery of the private residence of Doris and Charles Johnson at 291 East Gates Street in Columbus, Ohio, on April 10, 1969. The first trial lasted for a total of four days with the jury deliberating for a considerable period of time before finally being discharged when it became apparent there was no probability of agreement. The second trial lasted five days and the court initially sustained a motion to dismiss count number nineteen to the indictment (receiving and concealing stolen goods) and on its own motion, at the conclusion of the state's case dismissed counts number seven through eighteen (all of which either involved some form of unlawful detention under Section 2901.26, Revised Code of Ohio, or conspiracy to detain under Section 2901.34, Revised Code of Ohio).

The jury then found this defendant, Griffith guilty of the remaining six counts of the indictment (one count of Burglary of an Inhabited Dwelling under Section 2907.09, Revised Code

of Ohio, and five counts of Armed Robbery under Section 2901.13, Revised Code of Ohio) but found Ray, the co-defendant, not guilty.

The evidence presented by 17 witnesses for the state showed that two armed men wearing dark blue, homemade masks entered the home of Doris and Charles Johnson at approximately 10:25 P.M. on April 10. 1969, The men were in the house for approximately forty-five minutes in all. During this time one man stood guard over the various occupants who were in or came into the home while the second man loaded up all the property they could find including a valuable coin and money collection into seven suitcases which were taken to an awaiting 1959 Black and White Chevrolet with a license number of "M-08175 or M-80175" (Tr. 224). Several days later a car bearing the license number M-18705 and fitting the description of the getaway car was stopped and its occupants arrested. The owner of the car Rick Hughes subsequently disclosed that he had lent his car to the defendant Griffith on the night of April 10, 1969. A search warrant was obtained for defendant Griffith's home where several suitcases were found containing part of Mr. Johnson's coin collection and also various pieces of jewelry taken from Mrs. Johnson.

The state called Griffith's wife, Mrs. Margaret Griffith, as a witness and this was done over defense counsel's claim of privilege qualified by the statement of the prosecuting attorney that no testimony would be elicited not in the presence of known third parties (see Tr. 355).

Mrs. Griffith was particularly damning to her husband and told how two other men first approached him and told him about the coin collection at the Johnson home (Tr. 361). Later Griffith discussed this matter with Ray, who was a close friend.

On the night in question, Rick Hughes came over to the Griffith apartment at approximately 8:30 and let Harvey use his car (the '59 Chevrolet) that night (Tr. 367). Griffith and Ray cut up a blue sweatshirt then, in her presence, and made masks out of it.

Mrs. Griffith stated that Harvey and Ray then left the house at about 9:30 p.m. and Harvey returned at about 11:30 p.m. The loot later found by police in their search was brought into the apartment by Harvey a day or two after the robbery (Tr.

368). The defendant, Griffith, rested without putting on any testimony.

On Appeal to the Tenth District Court of Appeals respondent assigned as error the decision of the trial court to admit the testimony in evidence of respondent's wife. The Court of Appeals, in sustaining defendant's assignment of error and reversing the conviction, adopted what probably would be considered the traditional view that statutes in derogation of the common law are to be strictly construed and that Section 2945.42, Revised Code of Ohio, the statute involved here, only removed the competency disqualification for spouses in certain specifically enumerated situations, primarily those involving physical assaults of one spouse against the other.

The court, however, went further in its decision and also held that the use of the terms "competency" and "privilege" in the context of this problem was "a distinction without a difference" and that the testimony of a spouse, therefore, was just plain inadmissible without further evidentiary analysis. The court even held that if there be an exception to the statutory rule (although not finding one as such) it would relate only to communications between spouses, or acts done in the other's presence and the testimony here did not qualify as either a communication or an act.

On appeal to the Supreme Court of Ohio, petitioner raised the constitutional issue in proposition number one of his memorandum in support of jurisdiction now intended to be brought before this Court. Petitioner asserted that a statute which makes the category "spouse" a basis for incompetency may well be a denial of equal protection of the laws. Petitioners appeal was dismissed sua sponte, "no substantial constitutional question involved."

## REASONS FOR GRANTING THE WRIT

I. The petitioner contends that the decisions by the state courts of Ohio in this case have effectively denied the plaintiff, "State of Ohio", due process of law and equal protection of the law as prescribed by the Fourteenth Amendment to the Constitution of the United States. More specifically the petitioner asserts that the "State of Ohio", as the plaintiff or the prosecution in a criminal case constitutes "any person"

within the meaning of that Amendment and must enjoy the rights guaranteed therein.

The term State primarily connotes a collective concept of a people or a community. *Texas* v. *White,* 7 Wall 700, 74 U.S. 227 (1869). However, the State may also be a territorial entity, the government, or even the prosecuting attorney. *Mooney* v. *Holohan,* 294 U.S. 103, 55 S.Ct. 340 (1935). The crucial issue here is how the State, a party to a criminal prosecution, the representative and voice of all the people in that prosecution, and distinct from the overall judicial process itself, is to be characterized within the meaning of the Fourteenth Amendment.

As a party to this litigation the State, like the defendant, must be entitled to fundamental fairness in the laws and the rules of procedure. There can be no concept of due process if one of the party-litigants can be treated in an arbitrary maner. This is not to say, or even intimate, that the rights of the individual must be sacrificed, or that "fairness" to the State would necessarily be in derogation of the individual protections. Rather petitioner submits that if the criminal trial or process is to have any validity the people prosecuting the action must be assured of fair treatment in the court room. The effect of the denial of such protections to either side can be equally injurious to the overall purpose of the rule of law.

The prosecutor must be viewed as counsel for a number of people, the community, subject to a denial of due process by the Court, viewed as the State and the people, as the party-litigant, must fall within the meaning of the term "any person" and the application of the Fourteenth Amendment.

II. If then the State, that is the people, as represented by the prosecuting attorney, may be denied due process of law by the courts, the holding in this case is a denial to the people of their constitutional rights.

Ohio's husband/wife privilege statute Section 2945.42, Revised Code of Ohio, provides that:

> "***Husband or wife shall not testify concerning a communication made by one to the other or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence of a third person competent to be a witness***."

While an earlier part of this statute allows a spouse to testify *in favor of* the other, the prohibitions of the quoted material above have been interpreted as making the spouse an incompetent witness, *State* v. *Orth*, 79 Ohio St. 131 (1909), at least in the described situations. Petitioner concedes that this interpretation has some historical basis, but submits that the classification of a witness as "incompetent" now because he or she is a spouse exceeds the rational classification required by the equal protection clause of the Fourteenth Amendment. *Goesaert* v. *Cleary*, 335 U.S. 464, 69 S.Ct. 198 (1948).

The decision of the Court of Appeals for the Tenth District of Ohio, acquiesed in by the Ohio Supreme Court in its dismissal of petitioner's appeal, extended the application of the quoted language of Ohio Revised Code Section 2945.42 so as to deny the petitioner due process of law. In its opinion, the Court of Appeals, makes note of the fact that the testimony given by Mrs. Griffith concerned communications allegedly occurring in the presence of third persons, but quotes the headnote of *Rosser* v. *State*, 10 Ohio Law Abs. 69 (1931) for the proposition that even if testimony was to center on communications made in the presence of third persons, it could not be given since the spouse is an incompetent witness. Such an interpretation of the Ohio husband/wife privilege statute denies the people due process of law in criminal prosecutions, by denying them the same right to call witnesses in an arbitrary and capricious manner.

Historically testifying was a right of someone who had witnessed an event. *Wigmore* Evidence Section 2190 (3d ed.) (1940). The Statute of Elizabeth of 1662-63 couched testifying in terms of a "duty" to insure that those who were in fact witnesses would not fear exercising their "right." The "duty" to testify subsequently inhered in the prosecution as a common law matter and the Sixth Amendment provision for calling witnesses by parties defendant was to give both sides the same right. *Wigmore, supra* Section 2191. By denying the people of Ohio access to Mrs. Griffith's knowledge because she is a spouse, incompetent under all circumstances, this arbitrary classification denies the people the same protection afforded the defendant and is in violation of the Fourteenth Amendment. Further, if there does exist a "right" to testify Mrs. Griffith has been denied that right merely because she is a married person. Since a witness rarely, if ever, becomes an

actual party is situations where he would testify as here, petitioner is the only party who is able to assert that right before this Court.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiori should be granted.

Respectfully submitted,

David H. Bodiker
Assistant Prosecuting Attorney

Leo J. Conway
Assistant Attorney General
State of Ohio
Counsel for petitioner

## AFFIDAVIT

STATE OF OHIO
FRANKLIN COUNTY, SS:

David H. Bodiker, being duly sworn, deposes and says that he is an Assistant Prosecuting Attorney for Franklin County, Ohio and that a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio has been mailed to Thomas Tyack, 8 East Broad Street, Columbus, Ohio 43215, this____day of April, 1971.

David H. Bodiker

Sworn to before me and subscribed in my presence this___ day of April, 1971.

Notary Public

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

| | | |
|---|---|---|
| THE STATE OF OHIO | : | |
| Plantiff-Appellee, | : | |
| vs. | : | No. 9655 |
| HARVEY C. GRIFFITH, | : | |
| Defendant-Appellant. | : | |

DECISION

Rendered on June 16, 1970

MR. C. HOWARD JOHNSON, Prosecuting Attorney,
MR. DAVID BODIKER, Assistant,
Franklin County Courthouse,
Columbus, Ohio,
For Plaintiff-Appellee.

MR. THOMAS M. TYACK,
8 East Broad Street,
Columbus, Ohio,
For Defendant-Appellant.

TROOP, P. J.

Harvey C. Griffith and Jimmy L. Ray were jointly indicted on nineteen different counts, including breaking and entering, armed robbery, forcible detention, etc., by the grand jury of Franklin County. Thirteen of the counts were nullified by order of the trial court and trial was had on counts one through six. The jury found Harvey C. Griffith guilty of burglary in the night season of an inhabited dwelling, count one, and armed robbery, counts two through six. Mercy was recommended to count one. Judgment was entered pursuant to the verdict, from which Harvey C. Griffith appeals on questions of law.

Counsel for the appellant advances four assignments of error as the predicate for the appeal. The errors claimed to have been committed by the trial court are (1) the admission of the

adverse testimony of Griffith's wife Margaret; (2) refusing to permit defense counsel to cross-examine the state's witness, Williams; (3) the court made remarks to a defense witness concerning perjury, indicating a determination already made by the court; and (4) in the admission of some improperly identified and irrelevant exhibits.

The record before this court shows that counsel for appellant filed a motion asking for an order granting him a separate trial from the codefendant, Jimmy L. Ray. In the memorandum offered in support of the motion, counsel said:

> "It is anticipated that certain testimony of defendant Griffith's wife which would be inadmissible as to defendant Griffith (See 2945.42 ORC) will be offered with relation to the defendant, Jimmy L. Ray.***"

Examination of the transcript shows that counsel for defendant Griffith formalized his objection to the testimony of Mrs. Griffith by pointing out "that we have raised the issue of a privileged witness on the stand***the wife of the Defendant.***And that there is no waiver of the privilege; however, the Prosecutor has represented that the only testimony that would be elicited is in the presence of known third parties" (R.355). The applicable portion of the statute, noted by counsel in his memo, R. C. 2945.42, reads as follows:

> "***Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness,***."

No common-law rule is more clearly established than that one spouse may not be required to testify against the other in a criminal matter. The common-law rule is incorporated in R. C. 2945.42. By the same statute, husband and wife are made competent to testify in behalf of each other, and the common-law rule modified to permit a wife to testify against her husband in the prosecurion of a limited number of situations.

Referring to R. C. 2945.42, in *State* v. *Antill* (1964), 176 Ohio St. 61, the Supreme Court said, page 66, "The statute, which is in derogation of the common law, is to be strictly

construed. The statute does not make the wife a competent witness against the husband generally in all criminal cases." (The decision at this point notes *State* v. *Orth* [1908], 79 Ohio St. 130.) The court continues, "The General Assembly, having provided that the wife is competent as a witness in specifically enumerated cases, clearly did not intend tc remove the disqualification in cases not mentioned." (The court then notes *State* v. *Goodin* [1938], 60 Ohio App. 362, and *Rosser* v. *State* [1931, 10 Ohio Law Abs. 69.)

Attention is directed to those two cases, notation of which indicates approval by the Supreme Court. in *Goodin, supra,* the pertinent headnote is as follows:

> "1. In a criminal prosecution other than one of those specified in Section 13444-2, General Code, the wife of the defendant is not a competent witness to testify against him and it is reversible error to allow her to do so over his objection."

*Rosser, supra,* has particular interest in this discussion because the state in the instant case took the position that Mrs. Griffith could testify because she would be "in the presence of known third parties," as stated by counsel for defendant (R. 355). The basic holding in the case, a part of the headnote, is as follows:

> "Wife is not a competent witness against the husband in a prosecution for violation of the prohibition laws, even though a third person was present when the acts took place."

The headnote concludes with an observation on the seeming exception to the rule excluding a wife's adverse testimony, indicating she may testify if the "comunication made by one to the other," or "act done," was in the known presence or hearing "of a third person competent to be a witness." The court said that that provision "does not enlarge the class of cases in which the husband or wife is made competent to testify."

One other case should be noted, particularly because of reference in the decision to other important decisions. *State* v. *Rodriguez* (1959), 110 Ohio App. 307, makes reference to, and quotes from, *Orth, supra,* at page 311, as follows:

" '***That the Legislature did not intend by the adoption of this statute to abrogate, or modify, the firmly established general rule of the common law that husband and wife are incompetent to be witnesses against each other in criminal cases, is at once evident when we consider, that with the whole subject before it for consideration, it enacted, by positive provision and in express terms, that husband and wife shall be competent witnesses on behalf of each other, but declined to thus enact that they should be competent witnesses against each other. If it had been the purpose and design of the Legislature to so relax or change this rule of the common law as to permit husband and wife to testify against each other in the cases in said statute specified, it would doubtless have so declared in express and appropriate terms, and it would not have left this purpose to be ascertained or discovered by interpretation, or supplied by mere conjecture.' "

*Rodriguez* also notes *Ruch* v. *State of Ohio* (1924), 111 Ohio St. 580, because it bears on the distinction sometimes raised as to whether a spouse's testimony is "privileged" or "incompetent." The two terms appear to create a distinction without a difference. The comment in *Rodriguez,* at page 312, as to the decision in *Ruch*, is "that the wife's testimony for the state was not wholly incompetent because it could be considered in the absence of objection thereto." *Ruch* held, in syllagus ¶4, that testimony not in the presence of a third person was admissible, there being no objection raised by the defendant or counsel, "and no motion to exclude the testimony," and "attention of the trial court is not called thereto at any time during the trial." Defendant was held to have waived, and to admit the testimony was not, as a consequence, reversible error. Note, however, a later case, *Locke* v. *State of Ohio* (1929), 33 Ohio App. 445, which held that there was no waiver where objection was not made at the time the witness was sworn, but made later when the significance of the testimony became apparent.

In the instant case objection was properly and timely made before trial in support of a motion for severance and also before Mrs. Griffith was sworn (R. 355).

The testimony of Margaret Griffith needs brief review (R. 355 thru 400). As background for what she said, it is emphasized that if there be an exception to the statutory rule respecting adverse testimony of a spouse it relates only to a "communication" between the spouses, or an "act" done in the presence of the other. Admissibility hinges in either case on having occurred in the "known presence or hearing" of a third person "competent to be a witness."

Mrs. Griffith's testimony covered a wide area. She reported the "two guys" came to the apartment and told "me and Harvey" about a coin collection in the Johnson home (R. 360). These same "two guys," said the witness, "asked Harve if he knew anybody to do this job" – "they were going to split you know" (R. 361). The state also called upon Mrs. Griffith to identify her husband's "green beret" (R.366), and her husband's gun, which she said he had when he left the apartment (R. 366, 367). She also said that Rick Hughes let the defendant have his car the night of April 10, 1969 (R. 367), and that the police officers told her that Harvey and Jimmy pulled this job (R. 374).

It is submitted that not one smidgen of that testimony constitutes "communication" between the spouses, or an "act" done in the presence of Mrs. Griffith. The only "act" mentioned by Mrs. Griffith, amid this galaxy of adverse comment, was concerning the cutting of a sweat shirt, "they cut up" and made masks, and as to the doing of this "act" the record is completely silent as to the presence of any person competent to be a witness except it be the jointly-indicted defendants. Under R. C. 2945.42, it appears that each would be competent to testify against the other. But, as to the bulk of Mrs. Griffith's testimony, it constitutes neither "communication" nor "act," and the record falls far short of establishing the presence of a third party competent to be a witness.

The state, in oral argument (no brief having been filed), said that Mrs. Griffith had been called, as to the defendant, Ray, Griffith having rested. If that be true, it is not clear from the transcript. In any event, counsel for Ray objected to the testimony of Mrs. Griffith on behalf of his client, Ray, and the trial court overruled his objection and then said, "I do want to

point out that it applies to Harvey because he was there, as I understand the testimony."

The adverse testimony of Mrs. Griffith was tied directly to her husband by the direction of the court. It was admitted in violation of statutory provision, was prejudicial, and the basis for reversal.

Counsel for defendant-appellant asked the state's witness Robert Williams, 19 years old, if prior to April 10, 1969, he had "done any time" in any state penal or detention institution. The court sustained an objection to the question. An answer was proffered. This limitation on cross-examination appellant makes his second assignment of error. R. C. 2151.35 sets out the limitation on admissibility of evidence respecting minors. The applicable portion of the statute reads as follows:

> "***The disposition of a child under the judgment rendered or any evidence given in the court shall not be admissible as evidence *against the child in any other case* or proceeding in any other court,***."

(Emphasis added.)

This was not an "any other case or proceeding," against Robert Williams. Cross-examination as to "disposition" of the "child" was, therefore, proper, the statutory exclusion applying only to any action against him.

As his third assignment of error counsel calls attention to the comments of the trial court made after a defense witness, Diane Grubb, had been sworn and had answered several questions. The comments, made out of the presence of the jury, are as follows:

> "There is one thing I wanted to say, really wanted the witness to hear. I want the witness to know,***that I have never, but I'm going to start to encourage people to be charged with perjury if I believe that they have come into Court and taken the stand and intentionally perjured themselves.***
>
> "***we have had people come into court that have perjured themselves openly and nothing has ever been done about it.***"

Following this the court indicated a desire to have the witness know that she could expect the court to do something about perjury, and then concluded, as follows:

"***you have taken an oath to tell the truth and as long as you do there will be no problems."

The court's comments were directed to a single witness for the defense. No other admonitions were given to any other witness or to witnesses in a group. It cannot be said that the comment of the court influenced the jury. Counsel urges that it "had an effect on intimidating the witness and indicating to her that the Court was convinced that she was about to lie." Certainly any court convinced that a witness "is" lying has a duty to reprimand. Whether or not a court can anticipate perjured testimony is difficult of decision. The basic rule, uniformly to be respected by courts, is to avoid comments "prejudicial" to a litigant. (See 52 Ohio Jurisprudence 2d, beginning at page 504, with Section 22.) Certainly, it is within the Province of a court to instruct a witness as to testimony.

Counsel for appelant provides the answer to the instant query. He quite frankly said, during oral argument, that Miss Grubb, following the comments of the court, testified essentially the same as she had dome on the occasion of a prior trial which had ended with a "hung" jury. It cannot be said, such being the fact, that the comments of the court were prejudicial, even if they were erroneous, which we do not believe they were.

Finally, appellant objects to the admission of certain exhibits, i. e., state's Exhibits 8, 9, and 16. The testimony of Mrs. Johnson (R. 162), concerning the photograph of baggage and a jewelry box, indicates that they are no familiar to her. The photograph, Exhibit 9, contains many articles in no way connected with the Gates Street robbery. Only confusion could result in the admission of $190 in cash, the residue of the some of $340 found on Griffith at the time of arrest, $150 having been previously returned to Mrs. Griffith, never related to the stolen coin collection or otherwise identified by a witness for the state.

Appellant's three assignments of error are well taken as indicated.

The judgment of the trial court is reversed and the cause remanded for a new trial.

STRAUSBAUGH and STERN, JJ., concur.

**THE SUPREME COURT OF THE STATE OF OHIO**

*THE STATE OF OHIO*
*City of Columbus.* *1970 TERM*
*to wit:*_____

*No. 70-476*

State of Ohio,
Appellant,
*vs.*
Harvey Clayton Griffith,
Appellee.

**APPEAL FROM THE**
**THE COURT OF APPEALS**
*for FRANKLIN County*

*This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the maner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

*It is further ordered that the*_____ _____*appellee*_____*recover from the*_____*appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of Court of Appeals for FRANKLIN County for entry.*

*I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.*

*Witness my hand and the seal of the Court this*_____*day of*_____ *19*_____

_____*Clerk*

_____*Deputy*

**THE SUPREME COURT OF THE STATE OF OHIO**

*THE STATE OF OHIO*
*City of Columbus.*

*1970 TERM*
*to wit:* _____

*No. 70-476*

State of Ohio,
Appellant,
*vs.*
Harvey Clayton Griffith,
Appellee.

**MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS**

*for FRANKLIN County*

*It is ordered by the Court that this motion is overruled.*

*COSTS:*

*Motion Fee, $20.00, paid by David H. Bodiker*

*I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.*

*Witness my hand and the seal of the Court*
*this_____ day of_____ 19_____*
_____*Clerk*
_____*Deputy*